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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

SI DUNG LE,

Defendant and Appellant.

H034430

(Santa Clara County

Super. Ct. No. CC895738)

Defendant Si Dung Le pleaded no contest to second degree robbery (Pen. Code, §§ 211, 212.5, subd. (c))<sup>1</sup> and misdemeanor petty theft (§§ 484, 488). He also admitted allegations that he personally used a deadly or dangerous weapon (§ 12022, subd. (b)(1)) in the commission of the robbery and had suffered a prior serious felony conviction that also qualified as a strike (§§ 667, subds. (a), (b)-(i), 1170.12). After refusing to dismiss the prior strike conviction finding pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*), the trial court imposed a nine-year prison term.

On appeal, defendant claims the trial court misunderstood the scope of its discretion on the *Romero* motion and abused that discretion when it refused to strike the prior strike conviction finding. We affirm.

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<sup>1</sup> Further statutory references are to the Penal Code unless otherwise noted.

## **I. Factual<sup>2</sup> and Procedural Background**

Defendant loaded \$530 worth of food items into a shopping cart and left a San Jose market without paying for them. When the store's security officer, David Ngar, and its manager, William Ly, struggled with defendant for the cart outside the market, defendant pulled a large knife from the waistband of his pants and waved it around in a threatening manner. As he did so, a smaller knife fell to the ground. Ngar and Ly backed off, and defendant fled, leaving the cart behind. Police apprehended him a few blocks away. Ngar and Ly identified him at an in-field showup, and Ngar told police defendant was the same man who had stolen about \$250 worth of food from the market the day before.

Defendant told police that he was homeless and hungry and planned to sell the items to get money for food.

Defendant was charged by information with second degree robbery (§§ 211, 212.5, subd. (c)) and misdemeanor petty theft (§§ 484, 488). It was also specially alleged that he had personally used a deadly or dangerous weapon (§ 12022, subd. (b)(1)) in the commission of the robbery and that he had suffered a prior serious felony and strike conviction (§§ 667, subds. (a), (b)-(i), 1170.12).

Defendant pleaded not guilty and denied the prior conviction allegation. Eight weeks later, he changed his plea to not guilty by reason of insanity (NGI), and the court appointed two doctors to examine him to determine whether he was "incapable of knowing or understanding the nature and quality of his . . . act and distinguishing right from wrong at the time of commission of the offense." (§§ 1026, 1027.) Noting defendant's longstanding history of depression and his "reported" history of

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<sup>2</sup> Since defendant pleaded no contest, the facts are taken from the preliminary examination transcript. The parties stipulated, and the trial court found, that the preliminary examination transcript and the police reports provided a factual basis for defendant's pleas and admission.

schizophrenia and bipolar disorder, one doctor explained that the existence of such disorders in this case would be “virtually impossible to diagnose,” given defendant’s historical and ongoing abuse of amphetamines, because symptoms of amphetamine intoxication and effects are “virtually indistinguishable” from “acute to psychotic episodes.” The other doctor found “a strong possibility” that defendant’s reported behaviors and symptoms were produced by his frequent use of opium, noting that some of his symptoms were more characteristic of drug intoxication and withdrawal than of a primary psychotic disorder. Both doctors agreed defendant was legally sane when he committed his offenses.

Defendant withdrew his NGI plea, pleaded no contest to robbery and petty theft, and admitted the personal use and prior serious felony and strike conviction allegations in return for a prison term not longer than nine years and the opportunity to move, pursuant to *Romero*, for dismissal of the prior strike conviction finding.

In his *Romero* motion, defendant argued that he was mentally ill, that his strike prior was 12 years old, and that his criminal record “by itself could suggest that he is outside the spirit of the three strikes law which was meant to take violent, dangerous offenders off the street.” The district attorney responded that defendant had not led a crime-free life since the strike prior but had continued to commit crimes even while on probation. Moreover, the district attorney argued, “[t]he defendant’s prospects are poor. He has a tendency towards violence, weapons, and theft. His behavior has been slowly escalating, and his mental illness makes him unpredictable and dangerous. [¶] Given the defendant’s continuous criminality, he fits squarely within the spirit of the Three Strikes law.”

The trial court refused to strike the prior strike finding. Before ruling, the court expressed certain frustrations with the law: “I’m troubled by this. You know, Courts have to follow laws that judges don’t always agree with. And this is a case where I’m unhappy with what I feel that I have to do in terms of being intellectually honest and true

to my oath to uphold the law and yet do something that I'm not real happy about but I have to do." Although it sympathized with defendant's mental illness, the court explained, "I don't think that I can just say, gee, this guy's mentally ill and, as much as I'd like to, and say, hey, that's the basis for the *Romero* and I can grant the *Romero* based on that. I don't think that I can." "Absent the defendant's mental illness, this would be a no-brainer," the court pointed out, because defendant "would clearly fall within the four corners of the three-strikes law." The court recognized that it was required to look "behind this conviction . . . at the defendant's record, and unfortunately, what the Court notes is a record that is increasing with respect to severity [and] with respect to violence. And as sad a fact as that is, the Court feels obligated -- the Court can't find a legal reason to grant the relief that's requested."

At sentencing, the court denied probation and imposed a nine-year prison term calculated as follows: On the armed robbery count, the court imposed the mitigated two-year term and doubled it because of the prior strike. (§ 1170.12, subd. (c)(1).) The court sentenced defendant to a consecutive five-year term on the section 667, subdivision (a) enhancement, and struck the section 12022, subdivision (b)(1) enhancement (§ 1385). The court imposed a 30-day jail sentence on the petty theft count, gave defendant credit for 30 days, and deemed that sentence served.

Defendant filed a timely notice of appeal.

## **II. Discussion**

Defendant contends the trial court misunderstood the scope of its discretion on the *Romero* motion. He argues that the court's statements at the hearing "collectively demonstrate that, in the court's view, [defendant's] mental health issues could not, as a matter of law, serve as the bases for a 'furtherance of justice' finding within the meaning of Penal Code section 1385." Reversal is required, defendant urges, because the trial court abused its discretion when it "acknowledg[ed] and accept[ed] the fact of

[defendant's] mental illness, while declining to incorporate this fact into its 'furtherance of justice' analysis." We disagree.

"[A] trial court's refusal or failure to dismiss or strike a prior conviction allegation under section 1385 is subject to review for abuse of discretion." (*People v. Carmony* (2004) 33 Cal.4th 367, 375 (*Carmony*)). "In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, "[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve the legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.'" [Citations.] Second, a "decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.'" [Citations.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Carmony*, at pp. 376-377.)

"[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law . . . 'in furtherance of justice' pursuant to Penal Code section 1385(a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not presently been convicted of one or more serious felonies and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161 (*Williams*)).

This is precisely the approach the trial court took here. Our review of the record convinces us that the court fully understood the scope of its discretion on the *Romero* motion and properly applied it. As the court explained, "[i]f the Court had jurisdiction to

give a lesser sentence *without making Romero findings in favor of the defendant*, the Court would do so. The Court, unfortunately, with respect to interpreting the record before it, is *unable to find the requisite conditions . . .* that the interests of justice are best served and satisfied by in fact striking the strike.” (Italics added.) “Because I disagree with the outcome, in the Court’s opinion, does not mean that the Court goes ahead and strikes the prior because the Court’s unhappy with the outcome. The Court can only strike the prior if the Court is of the opinion that it’s in the interests of justice to do so and that the defendant does not fall within the purview of the three strikes law.”

The court’s statement of the law is fully consistent with *Romero* and *Williams*. As the *Williams* court explained, it would be an abuse of discretion if a court were to grant a *Romero* motion ““guided solely by a personal antipathy for the effect that the three strikes law would have on [a] defendant,” while ignoring “defendant’s background,” “the nature of his present offenses,” and other “individualized considerations.” . . .” (*Williams, supra*, 17 Cal.4th at p. 159, quoting *Romero, supra*, 13 Cal.4th at pp. 530-531.) That is not what the trial court did here. We reject defendant’s contention that the court misunderstood the scope of its discretion. (See *People v. Carrasco* (2008) 163 Cal.App.4th 978, 993-994 [rejecting a similar contention].)

“Discretion is the power to make the decision, one way or the other.” (*Carmony, supra*, 33 Cal.4th at p. 375.) Here, the record amply supports the court’s determination that the *Williams* factors weighed against striking defendant’s strike prior.<sup>3</sup> Defendant has a long and continuous criminal history. His crimes tend toward theft and violence. The most recent robbery is defendant’s fifth felony conviction. He armed himself with two knives in preparation, and brandished the larger one with such violence that Ngar

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<sup>3</sup> At the beginning of the hearing, the court stated that it had “read, considered, and reviewed” two probation reports, defendant’s *Romero* motion, and the People’s response. We note that the court had also presided over the preliminary examination and read the mental health reports.

“actually ran and locked himself in his car” to protect himself. Defendant was on probation when he committed his present offenses, having been convicted of grand theft for stealing meat and alcohol from Safeway in 2006. He was convicted of petty theft for stealing clothing from Kohl’s in 2007, also while on probation.

Defendant’s strike offense occurred in 1996, when he repeatedly assaulted his estranged second wife, chased her while brandishing “a large, hunting-type knife,” and threatened to kill her and their children. After pleading guilty in 1997 to two counts of inflicting corporal injury on a spouse (§ 273.5) and one count of making criminal threats (§ 422), he was granted probation, which he violated. Defendant also has four misdemeanor convictions for drug and Vehicle Code offenses. On this record, the court’s determination that defendant’s criminal history places him squarely within the purview of the “Three Strikes” law was neither irrational nor arbitrary.

The court’s determination that defendant’s background, character, and prospects—and particularly his mental illness—are not so extraordinary as to take him outside the purview of the Three Strikes law is also supported by the record. Reports of defendant’s mental status are conflicting. He has a history of depression, and he was conserved following suicide attempts in 2007. The conservatorship ended in February of 2008, however, after defendant told the reporting doctors that he felt “in control” and “d[id]n’t think too much . . . about killing myself.”

The probation report states, based on a conversation with the jail’s mental health supervisor, that “defendant was diagnosed with Paranoid Schizophrenia Chronic.” The court-appointed doctors, by contrast, refer to a “*purported* history of paranoid schizophrenia.” (Italics added.) They explain that schizophrenia and/or bipolar disorder would be “virtually impossible to diagnose,” given defendant’s historical and ongoing abuse of amphetamines, the symptoms of which mimic the symptoms of those disorders. Defendant admitted a 10-year addiction to crack cocaine and told one of the doctors that “his drug of choice is opium, smoked in a hookah.” The doctor concluded that “[i]t does

seem possible that [defendant] has, or has had, a psychological problem, but the nature, quality, and extent are unknown at this time. He is unable to describe his alleged symptoms, and some of the experiences he claims are more characteristic of drug intoxication and withdrawal than of a primary psychotic disorder.” Asked about his alleged auditory hallucinations, defendant told the doctor that “‘it might have been mostly (illegal) drugs, I guess.’”

The court-appointed doctors acknowledged that their current observations diverged from “some of the clinical history obtained upon medical record review.” During their interviews with defendant, they found “no evidence of delusions, hallucinations, thought disorder, nor of severe affective disorder.” They noted that defendant “clearly understands his actions in a reality based context and exhibits no overt psychotic symptomatology. . . . There is no evidence of any grandiose delusions or illogical thinking . . . .” Defendant “demonstrated adequate concentration,” during the interviews, and “his mental control was average.” The doctors saw “no overt impulsivity or disinhibition.” Defendant was aware of the charges against him and “discussed at length the types of pleas and ‘deals’ . . . he would consider.” The doctors found him “essentially quite consistent in his behaviors and statements to . . . non-mental disordered defendants in . . . attempting to limit the potential consequences of his alleged actions in order to get the best deal . . . .” Defendant told one doctor, “‘I just want to be sent to [the] hospital and released from there. I just want to be released.’” Given these facts, the trial court’s determination that defendant’s mental illness did not take him outside the purview of the Three Strikes law was not irrational or arbitrary.

A trial court’s refusal to strike a prior strike conviction finding constitutes an abuse of discretion only if no reasonable person could disagree that the defendant falls outside the spirit of the Three Strikes scheme. (*Carmony, supra*, 33 Cal.4th at p. 377.) We cannot say that in this case. Because the trial court clearly understood the scope of its

discretion and exercised it appropriately, its decision not to strike defendant's strike prior was not an abuse of discretion.

### **III. Disposition**

The judgment is affirmed.

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Mihara, J.

WE CONCUR:

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Bamattre-Manoukian, Acting P. J.

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Duffy, J.